

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLYN BERGSTROM

Claimant

VS.

SPEARS MANUFACTURING COMPANY

Respondent

AND

ZURICH U.S. INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,009,142

ORDER

This matter, decided by the Workers Compensation Board (Board) in its Order of September 10, 2007, is now before the Board on remand from the Kansas Supreme Court from its September 4, 2009, Opinion in No. 99,369. The Board heard oral argument in this matter on December 8, 2009.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Larry D. Shoaf of Wichita, Kansas.

The Board has considered the record and adopts the stipulations as set forth in its Order of September 10, 2007.

ISSUES

1. What is the nature and extent of claimant's disability? The parties acknowledged at oral argument to the Board that the Board's original determination that claimant suffered a 10 percent whole body permanent partial disability on a functional basis and a 37 percent task loss pursuant to K.S.A. 44-510e is the law of the case. The remand from the Supreme Court dealt only with the wage loss aspect of a work disability determination under K.S.A. 44-510e.

2. Is respondent entitled to an offset for any retirement benefit claimant is receiving under the Federal Social Security Act? Is this issue properly before the Board, having not been presented to nor determined by the ALJ?

FINDINGS OF FACT

The Board adopts the Findings of Fact as written in its Order of September 10, 2007. In its Order of September 10, 2007, the Board found that claimant failed to put forth a good faith effort to find employment after leaving her employment with respondent. Under the *Foulk*¹ and *Copeland*² policies in effect at the time, a wage was imputed to claimant and she was limited to her functional impairment of 10 percent to the whole body. However, the Supreme Court determined that a good faith requirement was not contained in K.S.A. 44-510e. The Court stated that when a workers compensation statute is plain and unambiguous, the Court must give effect to its express language, without speculation as to the legislative intent. The matter was reversed as to the wage loss component of K.S.A. 44-510e and remanded to the Board for a determination as to claimant's wage loss under the express language of the statute. In this instance, claimant was not employed at the time of the regular hearing. Claimant had been advised by James W. Zeiders, M.D., not to work due to low back pain. Thus, claimant has no wage income. When compared to her \$369.08 average weekly wage at the time of the accident, claimant has suffered a 100 percent wage loss as the result of the accident suffered while working for respondent.

PRINCIPLES OF LAW AND ANALYSIS

The Board is limited under K.S.A. 2008 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

The question regarding a possible offset for any Social Security retirement benefits claimant may be receiving was neither presented to nor decided by the ALJ. As the Board is not a court of first impression and has jurisdiction to only consider questions of law and fact presented to the ALJ, this issue will not be considered at this time. Respondent's belated appeal of this issue is dismissed.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.³

In averaging claimant's 37 percent task loss with a 100 percent wage loss, the Board finds that claimant has suffered a 68.5 percent permanent partial general disability pursuant to K.S.A. 44-510e.

CONCLUSIONS

The Kansas Supreme Court has ordered the Board to determine claimant's permanent partial general disability without consideration of a good faith element. The result is a stipulated functional impairment of 10 percent to the whole body, a task loss as noted above of 37 percent and a wage loss of 100 percent. When combining the task and wage loss factors, the result is a work disability of 68.5 percent. The Board's Order of September 10, 2007, is modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of the Workers Compensation Board of September 10, 2007, is affirmed with regard to the findings regarding task loss and functional impairment suffered by claimant from the September 23, 2002, injury but modified to find that claimant suffered a 100 percent wage loss and a resulting 68.5 percent permanent partial general disability.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carolyn Bergstrom, and against the respondent, Spears Manufacturing Company, and its insurance carrier, Zurich U.S. Insurance Company, for an accidental injury which occurred September 23, 2002, and based upon an average weekly wage of \$369.08.

Claimant is entitled to 34 weeks of temporary total disability compensation at the rate of \$246.07 per week totaling \$8,366.38, followed by 271.26 weeks of permanent partial general disability at the rate of \$246.07 per week totaling \$66,748.95 for a 68.5 percent permanent partial general disability, making a total award of \$75,115.33.

As of the date of this Order, the entire amount of the award would be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

³ K.S.A. 44-510e.

In all other regards, the Order of the Board from September 10, 2007, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Larry D. Shoaf, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge